UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC

and

CHERYL MULDREW, an Individual — Cases 15-CA-169007, 15-CA-170425, 15-CA-174022

and

LORRAINE MARKS BRIGGS, an Individual

and

BAKERY, CONFECTIONARY, TOBACCO WORKERS, AND GRAIN MILLERS UNION

COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ARGUMENT IN SUPPORT OF CROSS-EXCEPTIONS

COMES NOW Counsel for the General Counsel and, pursuant to Section 102.46 of the Board's Rules and Regulations, cross-excepts to the Decision of Administrative Law Judge Arthur J. Amchan, dated May 11, 2017, in the following particulars:

1.

First Cross-Exception: **The Judge erred in dismissing complaint paragraph 8(b), which challenged Respondent's instruction prohibiting employees from discussing company investigations with other employees, based on the Judge's mistaken conclusion that Gloria Lollis' trial testimony in support of this allegation was inconsistent with her prior affidavit testimony** (ALJD 9:1-2). [1]

[1] References to "ALJD" are to the pages and lines of the decision of the Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s).

Argument in Support of Cross-Exception

In January 2016,[2] Respondent conducted an investigation into whether employee Cheryl Muldrew had made threatening statements to certain coworkers. In the course of its investigation, employee Gloria Lollis was summoned to an office to meet with Human Resource (HR) Manager Eric McNiel and HR Assistant Annette Capetillo so they could question her about statements allegedly made by Muldrew (Tr. 14-21, 322-23, 328-29, 414-15).[3]

McNiel testified that it is not his practice to tell employees they cannot discuss investigations that may involve other employees (Tr. 414-15). He did, however, admit that when he meets with employees, "I let them know that what they are telling me is confidential" (Tr. 329). McNiel further testified that he did not perceive a need for confidentiality in the Muldrew investigation (Tr. 414).[4]

Lollis testified that she was summoned to meet with McNiel in his office around January 22, where she was questioned about statements Muldrew allegedly made to her while they were both working on the same production line several days before (Tr. 75-76; RX 1 at B-21).[5] Lollis repeatedly and consistently testified on both direct examination and cross-examination that during the meeting McNiel instructed her to keep what was said in the office confidential and that it should not go back on the floor (Tr. 77, 78, 81,

[2] Hereafter all dates are in 2016, unless otherwise specified.

[3] "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. "JX" references are to the numbered Joint Exhibits. Transcript references will be denoted by "Tr." followed by the page number(s).

[4] Respondent's position statement admitted as General Counsel Exhibit 9 denies that employees questioned during the Muldrew investigation were instructed not to discuss disciplinary actions or investigations. (GCX 9 at 3).

[5] The page numbers for RX 1 appear in the upper right corner of each page, appearing as "B-__."

82-83). McNeil did not deny instructing Lollis to keep the meeting confidential and Capetillo was never called as a witness.

On cross-examination, Respondent's counsel reviewed several passages of Lollis' Board affidavit with her, but the questioning was not impeaching. On the contrary, Lollis was asked about several statements in her affidavit which she acknowledged were correct and which were *not inconsistent* with her testimony on direct examination concerning the instructions McNiel gave her in the meeting (Tr. 79-89). Respondent's questions during cross-examination relating to her Board affidavit focused on eliciting from Lollis testimony about specific statements McNiel allegedly made to Muldrew (such as instructions not to discuss an employee's own discipline with others) that Lollis denied she was ever told, as reflected in her Board affidavit (Tr. 79-81).

Lollis' testimony fully supports paragraph 8(b) of the complaint which alleged that McNiel "told employees that company investigations were confidential and not to discuss investigations with other employees" (GCX 1[w] at page 5). Despite this, Judge Amchan dismissed this complaint allegation "due to the inconsistency between Gloria Lollis' trial testimony and the affidavit she gave to the Board prior to the hearing" (ALJD 9:1-2). Nowhere in the Judge's decision does he describe or summarize Lollis' testimony, nor does he provide any specifics as to how her hearing testimony diverged from her Board affidavit – the sole reason given for discrediting Lollis.

Judge Amchan's failure to credit Lollis and to sustain this complaint allegation is even more baffling in light of the following testimony Lollis gave on cross-examination:

> Q: And with respect to confidential information - in other words, when you came into the office to talk to Mr. McNiel and he said, this investigation, the things we're saying is confidential, that didn't surprise you at all, did it?

A: No.
Q: Because you wouldn't want to be out on the floor talking about allegations that may or may not be true against other people, correct?
A: Correct.
Q: Employees are entitled to their privacy relative to their own discipline?
A: True. (Tr. 82-83).

Moreover, following the conclusion of the General Counsel's case-in-chief, Respondent's counsel presented an opening statement which contains the following comment on Lollis' testimony:

> . . . [T]he Board is alleging that somehow we're violating the law by expressing to employees, in certain instances where we're undertaking investigations, that personnel matters are generally confidential. We're trying to protect the privacy rights of those people who are being investigated . . . . And so, to explain to an employee . . . that we want the confidentiality maintained is not problematic. It's just good personnel policy . . . . I mean what the Board is alleging is that we're somehow prohibiting employees to talk about their own discipline. You've heard from several witnesses in this case that they've never been told such a thing. And to the extent that Ms. Lollis understood what confidentiality, relative to an investigation meant, she said and testified under oath, that she didn't think it had anything to do with her discussing her own situation. It was just, please maintain confidentiality with respect to this investigation and how it might impact other employees (Tr. 242).

The foregoing clearly demonstrates that the Judge misapprehended Lollis' testimony on cross-examination in connection with statements contained in her Board affidavit and he erroneously discredited her for inconsistencies which simply do not exist. Because of this error, the Judge's dismissal of paragraph 8(b) of the complaint should be reversed.

Respondent failed to sustain its burden to show that the confidentiality instruction given to Lollis was supported by a legitimate business justification. Respondent does not assert that it gave the instruction to all employees involved in this investigation (GCX 9).

On the contrary, McNiel testified that he did not see any particular need for confidentiality in conducting the Muldrew investigation (Tr. 414), nor did he deny giving the instruction to at issue to Lollis (Tr. 325-28). Instead, the evidence shows that McNiel selectively admonished Lollis not to discuss the investigation with others, without a substantial and legitimate justification of the need for confidentiality (Tr. 77). Accordingly, McNiel's statement to Lollis violates Section 8(a)(1). *See Banner Estrella Medical Center*, 362 NLRB No. 137 (2015); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 873-74 (2011).

2.

Second Cross-Exception: **The Judge erred in finding Respondent's rule banning possession or use of cameras or video recording devices inside its facility without authorization and a management escort to be lawful, relying on *Flagstaff Medical Center,* 357 NLRB 659 (2011) as support for his determination** (ALJD 9:11-25;12:5-13).

Argument in Support of Cross-Exception

The mere maintenance of a rule that would reasonably have a chilling effect on employees' Section 7 activity violates Section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.,* 203 F.3d 52 (D.C. Cir. 1999). The Board has developed a two-step inquiry to determine if a work rule would reasonably tend to chill protected conduct. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. Second, if it does not, the rule will violate Section 8(a)(1) only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id*. at 647. In determining how an employee would

reasonably construe a rule, particular phrases should not be read in isolation, but rather considered in context. *Id*. at 646. Rules that are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful. *See University Medical Center*, 335 NLRB 1318, 1320–22 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope"), *enforcement denied in rel. part*, 335 F.3d 1079 (D.C. Cir. 2003). Finally, any ambiguity in an employer's rules is construed against the employer as the promulgator of that rule. *See Whole Foods Market, Inc.,* 363 NLRB No. 87, slip op. at 4 n. 11 (2015); *Lafayette Park Hotel*, 326 NLRB at 828, citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

Respondent admittedly maintains the following rule concerning cameras and imaging devices:

> Cameras or Imaging Devices. Employees, contractors, and visitors may not carry cameras or imaging devices into any Southern facilities. This includes: (1) conventional film, still cameras; (2) digital still cameras; (3) video cameras; (4) PDA cameras; (5) cell phone cameras. An employee with authorization to take pictures in the facility must sign in at the front reception desk and be given a Photographer's Pass. This pass must be worn at all times while shooting pictures. A Southern management employee must accompany the employee. (JX 2 at 13).

Respondent's General Manager Rickey Ledbetter testified that this rule is intended to protect proprietary information and processes and employee privacy (Tr. 288-89, 294-95). He further testified that it protects food safety by ensuring that cell phones or other items do not fall into the product (Tr. 289). It applies throughout all interior spaces of Respondent's facility, including employee break rooms (Tr. 302). He

acknowledged that the rule does not contain any language indicating that employees may have their cell phones in the break room (Tr. 303). Ledbetter further testified that this rule precludes employees from using their cell phone cameras in the employee break room, even while employees are on break (Tr. 302-03, 304).

Respondent's justification for its broad restrictions on the possession or use of any cameras or video recording devices anywhere inside its facility cannot withstand scrutiny. The scope of these rules goes well beyond Respondent's legitimate interest in protecting its proprietary information and processes.

The Board has consistently held that rules broadly prohibiting the use of employees' personal cameras and recording devices in the workplace on employees' own time and in nonwork areas unlawfully chill protected concerted activity. *Whole Foods, supra; Rio All-Suites Hotel & Casino,* 362 NLRB No. 190, slip op. at 4 (2015); *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4-6 (2016). Here, employees would reasonably read this rule to prohibit all possession or use of a camera or video recorder by employees, including attempts to document health and safety violations or other protected concerted activity. The rule provides no context that would indicate otherwise. This rule is also unlawful because it requires employees to secure permission from management before bringing the device into the facility and *requires a management escort* while taking pictures or videos.[6] Additionally, this provision clearly restricts employees from bringing cell phone cameras or conventional cameras anywhere inside Respondent's facility. These rules are unlawfully overbroad because employees would reasonably

[6] *See Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (finding rule requiring authorization to distribute literature on employee's own time in non-work areas unlawful); *Brunswick Corp.*, 282 NLRB 794, 794–95 (1987) (finding rule requiring permission to engage in solicitation during non-work times in non-work areas unlawful).

construe this rule to preclude them from using a cell phone to engage in Section 7 related communications from the time they came on duty or began their shift, including during breaks or meal periods.[7] Employees also would reasonably read this rule as precluding them from documenting and sharing information regarding working conditions through pictures and videos, such as employees working without proper safety equipment or in hazardous conditions.

In finding this rule lawful, the Judge stated that he found Respondent's business justification "more similar to *Flagstaff Medical Center* than other relevant Board cases" dealing with rules pertaining to photography (ALJD 12:5-6). *Flagstaff Medical Center*, 357 NLRB 659 (2011), however, concerned a healthcare facility where unique and substantial issues pertaining to patient privacy interests are implicated. The same cannot be said of Respondent's commercial bakery. The Board has rejected other attempts to extend *Flagstaff* beyond the healthcare setting to other commercial operations. *Whole Foods*, slip op. at 4. Moreover, the rule at issue in *Flagstaff* was not an outright ban on all photography inside its facility, as Respondent's rule is. Thus, the Judge's reliance on *Flagstaff* is clearly misplaced.

While Respondent has a legitimate interest in protecting its proprietary information and processes, it is equally evident that Respondent's total ban is not narrowly tailored to protect its legitimate interests and is reasonably construed to restrict employees' Section 7 rights. *See T-Mobile*, 363 NLRB slip op. at 4-5. The Judge

[7] *Central Security Services*, 315 NLRB 239, 243 (1994) (employer violated § 8(a)(1) by maintaining an overbroad rule that stated, "[o]nce on duty, the carrying and reading of any type of literature is strictly forbidden."); *see also Aluminum Casting & Engineering Co.*, 328 NLRB 8, 9 (1999) (finding unlawfully overbroad rule prohibiting production and maintenance employees from "[s]oliciting or selling on company premises except when all concerned are relieved from duty"), *enforced in relevant part*, 230 F.3d 286, 293 (7th Cir. 2000) ("Such a rule would prohibit protected activities even during breaks and lunches, and would be presumptively unlawful.").

determined that Respondent had a compelling interest in forbidding all photography in the employee break rooms because there are windows looking out into production areas (ALJD 12:11-13). However, he failed to address why the ban is justified in other non-production areas of the facility, such as the administrative and human resource office areas. The Board has recognized that employees taking photos or making video recordings in their workplace of employment-related matters can be an essential element in vindicating Section 7 rights. E.g., *Whole Foods*, slip op. at 3; *T-Mobile,* slip op. at 4. Therefore, Respondent's employees have a right to create such photos and recordings inside its facility that are protected by Section 7 of the Act. The Judge's ruling to the contrary must be reversed.

3.

Third Cross-Exception: **The Judge erred in finding Respondent's rule banning the use of all cameras and audio or video recording devices anywhere on Respondent's premises, in a company-supplied vehicle, or off premises while on company business, to be unlawful only insofar as it prohibited audio recordings in non-production areas of Respondent's facility** (ALJD 10:5-8; 12:5-19; 12:40-41).

Argument in Support of Cross-Exception

Respondent's employee handbook contains the following rule:

> Unauthorized use of still or video cameras, tape recorders, or any other audio or video recording devices on Company premises, in a Company supplied vehicle, or off-Company premises involving any current or former Company employee, without such person's expressed permission while on Company business. (JX 2 at 18, Rule 12).

As with the rule just discussed in cross-exception 2, *supra*, Ledbetter testified that this rule is intended to protect proprietary processes and employee privacy (Tr. 288-89, 294-95). Ledbetter further testified that Respondent considers a company-supplied vehicle to be an extension of the workplace, apparently asserting a need for the protection of

proprietary information in locations beyond Respondent's premises, without any further explanation (Tr. 295).

The Judge determined that this rule was overbroad only to the extent that it prohibited audio recordings in non-production areas of Respondent's facility (ALJD 12:15-19). It is submitted that the Judge erred in failing to go further and to find this rule to be unlawfully overbroad in other respects as well.[8] The Judge neglected to address this rule's clear application to exterior areas of Respondent's premises -- and to company-supplied vehicles and to individuals "while on Company business." Respondent presented no evidence justifying this broad restriction on using cameras and recording devices in exterior areas of Respondent's property and off-premises. This rule is reasonably read by employees to prohibit them from documenting and sharing information pertaining to working conditions or depicting protected concerted activities such as leafleting or employee protests which may occur on or near Respondent's premises. It is not readily apparent how recording activities in Respondent's parking lot or in a company vehicle would pose a threat to Respondent's proprietary information. Respondent also cannot justify its requirement that an employee obtain the "expressed permission" of current or former employees being photographed or recorded.[9]

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[8] The General Counsel contends that this rule constitutes an unlawfully overbroad prohibition on photography and audio/video recording inside Respondent's facility for the same reasons set forth in the argument in support of cross-exception 2, *supra*.

[9] *Cf*., *Labinal, Inc*., 340 NLRB 203, 209-10 (2003) (finding employer violated 8(a)(1) by maintaining rule that prohibited employees from discussing coworker's pay without latter's knowledge or permission; "By requiring that one employee get the permission of another employee to discuss the latter's wages, would, as a practical matter, deny the former the use of information innocently obtained, which is the very information he or she needs to discuss the wages with fellow workers before taking the matter to management."); *White Oak Manor*, 353 NLRB 795, 795 n.2 (2009) (employee's use of cell phone to take unauthorized pictures of coworkers to document disparate enforcement of dress code policy to induce group action to compel employer to fairly enforce policy "was part of the res gestae" of protected concerted activity), adopted and affirmed 355 NLRB 1280 (2010), enfd. 452 Fed. Appx. 374, 380 (4th Cir. 2011) (unpublished decision).

This rule is also unlawfully overbroad based on its use of the vague term "while on Company business," which is not defined in this rule. The Board has concluded that similarly vague phrases such as "on duty,"[10] "company time,"[11] "business hours,"[12] and "working hours"[13] are ambiguous and can reasonably be construed to include an employee's non-working time after a shift begins.

In light of the foregoing, it is submitted that the Judge clearly erred in failing to address the lawfulness of this rule as it applies to areas other than the interior of Respondent's facility.

4.

Fourth Cross-Exception: **The Judge erred in failing to find the following rule to be unlawfully overbroad: "Any conduct, which could interfere with or damage the business or reputation of the Company or otherwise violate accepted standards of behavior, will result in appropriate discipline up to and including immediate discharge"** (ALJD 9:35-38; 10:38-11:2).

Argument in Support of Cross-Exception

Despite the fact that Respondent failed to present any evidence justifying the maintenance of this rule, the Judge determined that the rule was lawful without providing any explanation or rationale for his conclusion (ALJD 9:35-38, 10:38-11:02).

In *Boch Honda*, the Board found a rule unlawfully overbroad which admonished employees from "engaging in any activity which could harm the image or reputation of the Company." 362 NLRB No. 83 (2015). Although the Act does not protect employee conduct aimed at disparaging an employer's product, Respondent's rule is overbroad as it

[10] *Central Security Services*, 315 NLRB at 243.

[11] See, e.g., *Southeastern Brush Co.*, 306 NLRB 884, 884 n.1 (1992).

[12] See, e.g., *Ichikoh Mfg.*, 312 NLRB 1022, 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994) (consent judgment).

[13] See, e.g., *Hyundai America*, 357 NLRB at 872-873 (rule prohibiting "activities other than Company work during working hours" unlawfully overbroad); *Nations Rent*, 342 NLRB 179, 186 (2004).

provides no examples or context that would suggest the provision is only aimed at unprotected conduct. The rule is reasonably read to encompass protected conduct, such as employees engaging in public criticism of Respondent's labor policies, which could potentially damage Respondent's business and reputation. *Boch Honda, supra*; *Karl Knauz Motors, Inc.*, 358 NLRB 1754, 1754-55 (2012); see also *NLRB v. IBEW, Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 468-71 (1951). Further, the amorphous reference to "accepted standards of behavior" leaves it to Respondent's discretion to determine what conduct is permissible. The Board determined that under these circumstances, a reasonable employee would assume that the employer would not consider Section 7 activity such as labor protests or public criticism of its policies to be acceptable, and might then refrain from engaging in such activity. See *First Transit, Inc.*, 360 NLRB 619, 619 n.5 (2014) (unlawful rule prohibited participation "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company"). Thus, this rule is an ambiguous and impermissibly vague restraint on employee behavior and the Judge's contrary finding must be reversed.

5.

Fifth Cross-Exception: **The Judge erred in finding Respondent's rule prohibiting "any off-duty conduct which could impact or call into question the employee's ability to perform his or her job" to be lawful** (ALJD 10:1-2; 10:38-11:2).

Argument in Support of Cross-Exception

General Manager Ledbetter testified that this rule is justified by Respondent's interest in prohibiting illegal or undesirable conduct employees may engage in while off-

duty, such as engaging in a shooting rampage or harassing a customer of Respondent (Tr. 293-94). This rule, however, contains no limiting language or examples which would allow employees to understand that this rule would not encompass activities protected by Section 7.

Section 7 of the Act protects employees' right to engage in concerted activity to improve their terms and conditions of employment, even if that activity is in conflict with the employer's interests. Where a rule is reasonably read to prohibit such activities, it will be found unlawful. However, where the rule includes examples or otherwise clarifies that it is limited to legitimate business interests, employees will reasonably understand the rule to prohibit only unprotected activity. See *Tradesmen International*, 338 NLRB 460, 461–62 (2002).

Here, Respondent's rule is so broad and amorphous that a reasonable employee would interpret it to include any perceived disloyal conduct, such as strike activity or public criticism of Respondent's labor policies. See *First Transit, supra,* at 619 n. 5 (unlawful rule prohibited participation "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company").

In *Hyundai America*, the Board found lawful a rule which prohibited "exhibiting a negative attitude toward or losing interest in your work assignment" 357 NLRB at 861. The Board reasoned that the rule was lawful since it was limited only to an employee's attitude toward a given work assignment, it would not be construed as prohibiting protected activity. The rule at issue here is not narrowly tailored to the job assignment

and instead, addresses the employee's job as a whole. As such, employees would reasonably construe the rule to encompass Section 7 activity and the Judge clearly erred in failing to find it to be unlawful.

6.

Sixth Cross-Exception: **The Judge erred in finding Respondent's rule prohibiting unauthorized entry into the facility by employees to be lawful** (ALJD 11:footnote 11).

Argument in Support of Cross-Exception

Respondent's handbook contains the following rule: "Bringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. Unauthorized plant entry by employee." (JX 2 at 19, Rule 7).

General Manager Ledbetter testified that this rule is justified by Respondent's legitimate interest in maintaining control of who enters the facility in order to protect product safety and the safety of on-duty employees. (Tr. 296-97, 306-08).

Under Board law, employees who work at Respondent's Hope, Arkansas facility, and who are off-duty, may not be denied access to the interior of the facility to engage in protected concerted activities absent a lawful rule barring entry to those areas by off-duty employees.[14] Under *Tri-County Medical Center*, such a no-access rule is lawful only if it "(1) limits access solely with respect to the interior of the plant and other working areas;

14 See *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB 144, 146 n.4 (2012) (applying *Tri-County* and finding that "[w]hen [the *Tri-County*] conditions are not met, employees seeking to engage in protected, concerted activity are, indeed, entitled to access to the interior of the employer's facility, pursuant to Sec. 7"). *J.W. Marriott* was issued by a panel that under *Noel Canning* was not properly constituted. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Board should adopt the sound reasoning and rationale of the *J.W. Marriott* decision as its own. See also *Baptist Memorial Hosp.*, 229 NLRB 45, 45 n.4, 49-50 (1977) (in case involving employees distributing handbills in hospital lobby and on sidewalk, Board majority concluded "off-duty employees have a right to remain on or to enter the [e]mployer's premises for solicitation or distribution of union literature subject only to the [e]mployer's need to maintain production, discipline, or security"); *Piedmont Gardens*, 360 NLRB 813, 813-14 (2014) (employer maintenance of rule restricting off-duty employees access to interior areas held facially unlawful because rule was invalid under *Tri-County* by not barring access for any purpose).

(2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity."[15] Thus, if an employer's rule fails to satisfy each of these three conditions, employees who are off-duty are entitled access to the interior areas of the facility where they work for Section 7 purposes.[16]

Applying these principles here, the Judge erred in finding that Respondent's maintenance of its no-access rule was lawful when the rule fails to satisfy the third element of the *Tri-County* test since there is no blanket prohibition of such access for off-duty employees for *any purpose*.[17] Respondent presented no evidence as to the circumstances in which off-duty employees are authorized to enter the facility and when such permission is denied.[18] As the Board stated in *Casino San Pablo*, allowing access only with management's approval "effectively vests management with unlimited discretion to expand or deny off-duty employees' access for any reason it chooses." *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6 (2014); *Saint John's Health Center*, 357 NLRB at 2080-83 (finding rule denying off-duty employees access to interior of facility unlawful where it was not blanket prohibition but "permitted access to the building to attend [employer-] sponsored events, such as retirement parties and baby showers"; Board majority concluded rule told employees "you may not enter the

15 *Tri-County Medical Center*, 222 NLRB at 1090.

16 See *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB at 146 n.4; Baptist Memorial Hosp., 229 NLRB at 45 n.4, 49-50; *Piedmont Gardens*, 360 NLRB at 814.

17 See e.g., *Sodexo America*, LLC, 358 NLRB 668, 669 (2012) (off-duty access policy "violates Section 8(a)(1) because it does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose"), citing *Saint John's Health Center*, 357 NLRB 2078, 2082-83 (2011). *Sodexo America* was issued by a panel that under *Noel Canning* was not properly constituted. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Board should adopt the sound reasoning and rationale of the *Sodexo America* decision as its own.

18 See *Piedmont Gardens*, 360 NLRB at 814 (finding employer's no-access rule for off-duty employees unlawful despite employer's claim it permitted access only in three limited circumstances because evidence did not establish these were only circumstances under which employer had granted interior access).

premises after your shift except when we say you can"). Thus, the Board should grant this exception and hold that Respondent's maintenance of its no-access rule violates Section 8(a)(1).

7.

Seventh Cross-Exception: **The Judge failed to address General Counsel's request for consequential damages and failed to provide for such a remedy in his decision** (ALJD 13:11-24).

Argument in Support of Cross-Exception

In the Second Consolidated Complaint, the General Counsel specifically requested that the make-whole remedy for Lorraine Marks Briggs include "reasonable consequential damages incurred as a result of Respondents' [*sic*] unlawful conduct" (GCX 1[w] at 7). An argument supporting this relief was also included in the General Counsel's post-hearing brief to the ALJ. Despite this, however, Judge Amchan failed to address this issue and made no provision for consequential damages in his decision.

Respondent should be ordered to compensate Briggs for any consequential economic harm she sustained because of her discharge.

Under the Board's present remedial approach, some economic harm that flows from a respondent's unfair labor practices is not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 INDUS. REL. L.J. 599, 603 (1985) (traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders.

E.g., *Graves Trucking*, 246 NLRB 344, 345 n.8 (1979). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondents to compensate employees for all consequential economic harms sustained, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See, e.g., Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See, e.g., Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require

reimbursement for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (change from computing simple interest on backpay awards to computing daily compound interest); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so 'the victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay his or her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees,

foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[19] Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (employee entitled reimbursement for out-of-pocket medical expenses incurred during backpay period and it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[20]

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new

[19] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

[20] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

work), *enforced*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (employee entitled to reimbursement for clothes ruined because she was unlawfully assigned more onerous work task of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (employee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a collective-bargaining agreement with the employer). In these circumstances, the employee would not have incurred the consequential financial loss absent Respondent's original unlawful conduct; therefore, compensation for these costs was necessary to make the employee whole.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate

discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.[21] In *Nortech Waste*, *supra*, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where—as in *Nortech Waste*—there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for consequential medical expenses); *Lee Brass Co.*, 16 NLRB 1122, 122 n. 4 (1995).[22]

[21] This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

[22] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); *see also Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), *affirmed mem.*, 862 F.2d 304 (2d Cir. 1988).

CONCLUSION

For the reasons discussed above, the General Counsel requests that the Board grant each and every cross-exception and find that Respondent committed additional violations of Section 8(a)(1) as set forth herein.

Dated at Memphis, Tennessee, this 26th day of September, 2017.

/s/
Linda M. Mohns
Counsel for the General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, a copy of Counsel for the General Counsel's Cross-Exceptions and Argument in Support was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on September 26, 2017, a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was served by e-mail on the following:

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